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Supreme Court, U.S.
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No. 96-1160

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT RICHARDSON
PETITIONER

VS.

ALBERTSON'S, INC.
A DELAWARE CORPORATION
RESPONDENT

ON PETITION FOR A WRITE OF CERTIORARI TO

TENTH CIRCUIT COURT

RELY BRIEF TO THE OPPOSING BRIEF

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13 pp

QUESTION PRESENTED

1. Whether Tenth Circuit came in conflict with itself when it made this decision.

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I. United States Supreme Court has jurisdiction.

A. 28 U.S.C.S. 1257 states:

> Final judgements or decree rendered by the highest court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States ...

This case involves the validity of a state statute on the grounds of its being repugnant to the Federal Rules of Civil Procedure, Rule 56 under the Constitution. Petitioner asserts that the Tenth Circuit Court appeals decision was in violation of the Federal Rules of Civil Process (Rule 56[s]) when the Court granted a summary judgment and it came in conflict with the U.S. Supreme Court's decision, Celotex Corp. v. Catrett.

The issue was first raised by Petitioner when the United States District Court granted a summary judgment for Respondent. Petitioner stated that granting of a summary judgment for the Respondent was in violation of Rule 56, when there was no full disclosure and the Court did not have all the pleadings, depositions, answers to interrogatories, witnesses, testimony, and admissions from either Respondent or Petitioner.

II. Tenth Circuit Court appeals made a decision on misstated facts because there was no full disclosure.

A. Petitioner left work on June 2, 1992 after working 7 hours. Petitioner telephoned the bakery manager and told her Petitioner was not returning to work because Petitioner was sick. Petitioner called in sick on June 3, 1992, and Petitioner had a scheduled day off on June 4, 1992. In the Respondent's brief, the Petitioner was suspended on June 5, 1992. The Tenth Circuit Court of Appeals stated (see Appendix A p. 4, Writ of Certiorari) Petitioner did comply with Respondent's rules by calling in sick. Respondent's rules are that an employee has to call in when they are sick. An employee needs a doctor's note after three (3) days of absentees from work. Petitioner has never broken any of Respondent's rules because Petitioner called in sick on June 3, 1992. In the case of St. Mary's Honor Center v. Hicks (1993) L Ed 2d 407, it is stated: "The Plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Defendant were not its true reasons but were a pretext for discrimination." 450 US, at 253, 67 L Ed 2d 207, 101 S Ct 1089. The dissent takes this to mean that if Plaintiff proves the asserted reason to be false, the Plaintiff wins. However, a reason cannot be proved to be "a pretext for discrimination" unless it is shown that the reason was false and that discrimination was

the real reason. Burdine's later allusions to proving or demonstrating simply "pretext," e.g., id., at 258 67 L Ed 2d 207, 101 S Ct 1089, are reasonably understood to refer to the previously described pretext, i.e., "pretext for discrimination."

Burdine also states that when the employer has met its burden of production, "the factual inquiry proceeds to a new level of specification." Id., at 255, 672 Ed 2d 207, 101 S Ct 1089. The dissent takes this to mean that the factual inquiry reduces to whether the employer's asserted reason is true or false. If false, the Defendant loses. Evidence shows that Petitioner proved Respondent gave false reason to terminate Petitioner by stating that Petitioner lied about being sick and asked a co-worker to lie for Petitioner, who failed to report to work. Evidence also shows that Petitioner was only following the company's rules by calling in sick and that Petitioner never asked a co-worker to lie for Petitioner on June 4, 1992, when Petitioner had a scheduled day off. Therefore, Petitioner proves the discrimination case under Burdine's and St. Mary's Honor Center v. Hicks.

III. Tenth Circuit did not correctly determine that Petitioner had failed to establish a prima facie case of racial discrimination.

The District Court and Tenth Circuit did make an err in the prima facie case of racial discrimination under the Rules of Evidence §

383 discrimination -- presumption -- burden of persuasion 4a to 4c. Although the presumption -- created by the establishment of a prima facie case in an action alleging that an employer intentionally discriminated against an employee on the basis of race in violation of § 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 USCS § 2000e-2(U)(1) -- that the employer has unlawfully discriminated against the employee shifts the burden to the employer to produce a nondiscriminatory reason for its allegedly discriminatory actions, the ultimate burden of persuading the trier of fact that the employer has intentionally discriminated against the employee remains at all times with the employee, if the employer carries the burden of production, the presumption is rebutted and drops from the case, and the employee has an opportunity to demonstrate, through presentation of the employee's own case and through cross-examination of the employer's witnesses, that the proffered reason was not the true reason for the employment decision and that race was the primary reason. Since the District Court did not have a trial or a full disclosure under Rule 56[s], then this is an err in law under the Constitution.

Petitioner did present issues of conflict among the courts of appeals or between the Tenth Circuit and this Court.

A. Petitioner did present a conflict between the Tenth Circuit and this Court in the case of Celotex Corp. v. Catrett, but the Tenth Circuit did not look at any of Petitioner's arguments.

1. Did not look at any of Petitioner's evidence. See Appendices D, E, and F.
2. The Tenth Circuit did not look at any of Petitioner's argument briefs.

The Tenth Circuit had all of this information and still stated that Petitioner failed to report to work as scheduled, however, a person who has called in sick is excused from work. The Tenth Circuit did not want to use the conflict between the Court but used a misstated fact in this case. The Tenth Circuit had an opportunity to examine the evidence and argument in this case but did not do so.

B. Petition for a Writ of Certiorari should be granted based on questions presented because the Tenth Circuit's decision was based on misstated facts.

The Tenth Circuit used a misstated fact to try to get around Rule 56[s] and due process. The Tenth Circuit did set a standard on how to grant a summary judgment in the case of Haines v. Kerner but did not use these standards in the case of Richardson v. Albertson's. This is standard [8]. The District Court's discretion to choose a sanction is limited in that the chosen sanction must be both "just" and "related to the particular claim, which was at issue in the order to provide." Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707, 102 S. Ct. 2099, 210 672 2 Ed 2d 492 (1982). Before choosing dismissal as a just sanction, a court should ordinarily consider

a number of factors, including: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process, (3) the capability of the litigant, Ocelot Oil Corp. v. Sparrow Indus. 847 F 2d 1458, 1465, 10th Cir (1988), quoting Meade, 841 F 2d at 1521 N 7 10th Cir. (1988), (4) whether the Court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, see e.g., Willner v. University of Kansas, 848 F 2d 1023, 1030, 10th Cir (1988) (per curiam) Cert. denied 488 U.S. 1031, 109 S Ct 840, 102 2 Ed 2d 972 (1989); Standard Metals, 817 F 2d at 629; Moon v. Newsome, 863 F 2d 835, 837, 11th Cir, Cert. denied 493 U.S. 863 110 S Ct 180, 107 2 Ed 2d 135 (1989); Spiller v. U.S. V. Labs, Inc., 842 F 2d 535, 538, 1st Cir (1988); and (5) the efficacy of lesser sanctions. See Ocelot Oil, 847 F 2d at 1465; Meade, 841 F 2d at 1520; Taylor v. Medtronics Ins., 861 F 2d 980, 986, 6th Cir (1988). "Only when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits is dismissal an appropriate sanction." Meade, 841 F 2d at 1521 N 7 (citations omitted).

[9, 10] These factors do not constitute a rigid test; rather, they represent criteria for the District Court to consider prior to imposing dismissal as a sanction. The Court should ordinarily evaluate these factors on the record.

When the Tenth Circuit Court did not use its own rules, it came in conflict with itself. The Tenth Circuit Court granted a summary judgment in favor of Respondent. It was in violation of its own standards, therefore the certiorari should be granted.

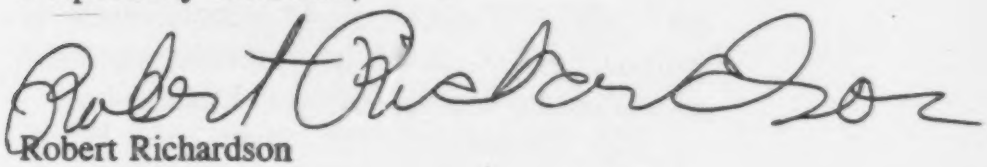
IV. Tenth Circuit Court erred when it determined the District Court lacked jurisdiction over Petitioner ADA claim because Petitioner did give adequate documentation to EEOC.

The Petitioner did give the EEOC documents about his problems with asthma. In a letter dated October 22, 1993, the EEOC addressed the documents Petitioner left at the EEOC office. The Tenth Circuit Court did not look at the evidence (see Appendix in writ of certiorari). When the Tenth Circuit Court made the decision on the ADA, it came in conflict with itself, i.e., case of Ehrenhaus v. Reynolds cited as 965 F 2d 916 (10th Cir. 1992), and it came in conflict with Pryner v. Tractor Supply Co., cited as 927 F Supp 1140 (S.D. Ind. 1996) and the violation of the Rules of Evidence, Celatex Corp. v. Catrett, 477 U.S. 317 (1986) and Rule 56[5].

CONCLUSION

This case presents serious due process issues when the court came in conflict with itself. This court has problems looking at the law and constitutional laws. This court has violated the rules and statues of the court. Petitioner respectfully requests this Court to grant writ of certiorari to review this issue.

Respectfully submitted,



Robert Richardson